

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34405

STATE OF IDAHO,)	2008 Unpublished Opinion No. 665
)	
Plaintiff-Respondent,)	Filed: September 30, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
ROBERT D. GLENN,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Renae J. Hoff, District Judge.

Order denying Idaho Criminal Rule 35 motion for correction of an illegal sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

PER CURIAM

In 1998, Robert D. Glenn was convicted of lewd conduct with a minor under sixteen, Idaho Code § 18-1508. The district court imposed a unified nine-year sentence with a two-year determinate term. Glenn was paroled in 2004. His parole was subsequently revoked, however, and he was again incarcerated to serve the remainder of the sentence. Glenn thereafter filed an Idaho Criminal Rule 35 motion for correction of an illegal sentence, asserting that his sentence was extended by the Parole Commission, in violation of the United States and Idaho Constitutions, when the Commission declined to give him credit for 855 days spent on parole. Glenn later filed a supplement to his Rule 35 motion arguing that his sentence is illegal in light of *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006), because his attorney did not advise him of the consequences of undergoing a psychological evaluation. The district court denied Glenn's Rule 35 motion, and Glenn now appeals.

Glenn's contention that the Parole Commission unlawfully extended his sentence is without merit. As Glenn acknowledges, Idaho Code § 20-228 confers discretion on the Parole Commission to grant credit on a defendant's sentence for time served on parole when a felon's parole is revoked. Nothing in Idaho law requires the Parole Commission to grant such credit. Glenn's contention that the Parole Commission's action unconstitutionally extended the sentence is incorrect, for his term of imprisonment has not been extended beyond that imposed by the court. Glenn's unified sentence was for a term of nine years of *incarceration*, and time spent on parole does not constitute service of a term of incarceration. *See* I.C. § 18-309. Accordingly, this component of Glenn's Rule 35 motion was properly denied.

The district court also correctly rejected Glenn's supplemental argument that his sentence was illegal because his attorney did not properly advise him regarding psychological evaluations. Such allegations do not demonstrate an illegal sentence. An illegal sentence for purposes of Rule 35 is a sentence in excess of a statutory provision or otherwise contrary to applicable law. *State v. Alsanea*, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003). The facts alleged by Glenn set out, at most, a claim of ineffective assistance of counsel, but a Rule 35 motion is not a vehicle to raise issues of ineffective assistance of counsel.

Even if Glenn received inadequate advice from his defense attorney regarding the psychological evaluation, that deficiency would not render his sentence illegal for purposes of Rule 35. Accordingly, the district court's order denying Glenn's I.C.R. 35 motion is affirmed.